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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-997

DONALD G. FENDER,
Petitioner,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Civil Appeals, Fifth Supreme Judicial District of Texas

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TABLE OF CONTENTS

	Page
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdictional Grounds	2
Question Presented	2
Statutes Involved	3
Statement of the Case	3
Argument	6
Conclusion	10
Appendix:	
Order of 101st Judicial District, Dallas, Texas	A-1
Opinion of Court of Civil Appeals, Fifth Supreme Judicial District	A-2
Order of Supreme Court of Texas	A-9
Opinion of Appellate Court of Illinois, Fifth Appellate District	A-10
Opinion of Supreme Court of Illinois	A-18

CITATIONS

Case

Burnett v. N. Y. Central R.R., 380 U.S. 424 ..... 3, 7, 8

Statutes

Title 28, U. S. Code, Section 1257 2

Federal Employers Liability Act (45 U.S. Code Section 51 et seq. 3

Rules

Rule 184A, Texas Rules of Civil Procedure 8

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To the Court of Civil Appeals, Fifth Supreme Judicial District of Texas

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Donald G. Fender, prays that a writ of certiorari may issue to review the order and judgment of the Court of Civil Appeals, Fifth Supreme Judicial District of Texas, and the order of the Supreme Court of Texas refusing this petitioner's application for a writ of error.

OPINIONS BELOW

The official opinion of the Court of Civil Appeals, Fifth Supreme Judicial District is reported in Donald G. Fender v. St. Louis Southwestern Railway Company, 513 S.W. 2d 131 (1974). The order of the Supreme Court of Texas denying petitioner's application for writ of error is unreported but appended. The judgment of the trial court is unreported but appended.

JURISDICTIONAL GROUNDS

The Supreme Court of Texas denied petitioner's application for writ of error on the 13th day of November, 1974, and its order was entered on that same date. The Court of Civil Appeals for the Fifth Supreme Judicial District dated and entered its order and judgment which petitioner seeks to have reviewed here on the 6th day of June, 1974.

A petition for rehearing in that court was denied on the 8th day of July, 1974.

Jurisdiction to review the judgment in question by writ of certiorari is conferred by the provisions of Title 28 U.S. Code, Section 1257.

QUESTION PRESENTED

The question presented is whether the State of Texas is obligated to take notice of, and give credit to, proceedings commenced in the State of Illinois within the three year Federal Employers Liability Act statute of Limitations for the purpose of tolling the running of that statute where the State of Illinois dis-

missed the plaintiff's action under the doctrine of *forum non conveniens* requiring him, thereby, to refile his action in the State of Texas more than three years after the date of the occurrence, but yet well within the tolled period.

This question is raised under *Burnett v. New York Central Railroad Company*, 380 U.S. 424 (1965) which held that the petitioner who had his action dismissed in the state court for improper venue had the right to refile his action in a court with proper venue notwithstanding the fact that more than three years had elapsed, the filing in the state court operating to toll the statute of limitations as of that time. This decision was not followed by the Texas courts, these courts refusing to take notice of or give credit to the proceedings in the Illinois courts notwithstanding the fact that the Illinois action was brought to the attention of the Texas courts.

STATUTES INVOLVED

The first paragraph of Title 45, U.S.C. Section 56, provides:

> "No actions shall be maintained under this act unless commenced within three years from the day the cause of action accrued."

STATEMENT OF THE CASE

Petitioner, Donald G. Fender, a switchman employee of the respondent, the St. Louis Southwestern Railway Company, sustained a back injury on the 7th day of December, 1967, while working for his employer in Dallas, Texas. A ruptured intervertebral disc was surgically removed from his back by doctors in St. Clair County, Illinois, following which operation, the petitioner, in May of 1968, filed an action under the Federal Employers

Liability Act in the Circuit Court of St. Clair County, Illinois. The respondent moved to dismiss his action under the doctrine of *forum non conveniens* contending that the convenient place to try the action was Dallas, Texas, the place of its occurrence. The respondent's motion was granted by the trial court and, while the Illinois Appellate Court (125 Ill. App. 2d 211, 260 N.E. 2d 373 (1970)) reversed the trial court's action, the respondent ultimately prevailed in the Illinois Supreme Court which affirmed the dismissal in an opinion filed on May 21, 1971. A petition for rehearing in the Illinois Supreme Court was denied on October 4, 1971 (49 Ill. 2d 1, 273 N.E. 2d 353 (1970)).

On the 12th day of October, 1971, the respondent refiled his claim under the Federal Employers Liability Act in the 101st Judicial District Court in Dallas, Texas, eight days after the denial of his petition for rehearing by the Illinois Supreme Court, but ten months after the three year period prescribed by the statute of limitations. Two years later, in September of 1973, but still within the tolled statute, the respondent moved for a summary judgment alleging fraud in petitioner's employment application and that the statute of limitations had run. Respondent admitted in its brief, however, filed in support of its motion for summary judgment, that:

> "Plaintiff filed a suit under the Federal Employers Liability Act in the Circuit Court in the Twentieth Judicial Circuit of St. Clair County, Illinois, in May of 1968; and that in response to this complaint, the defendant filed a motion to dismiss the case 'on account of the application of the doctrine of forum non conveniens.' "

The petitioner attached to his brief, filed in opposition to the motion for summary judgment, a copy of the reported decision of the Illinois Supreme Court and referred to that copy and to that opinion in his brief.

No contention was made by the respondent either in its motion for summary judgment or in its brief in support of that

motion that the petitioner had not filed the Illinois action within the applicable three year statute of limitations.

The trial court granted the motion for summary judgment on December 28, 1973, not stating its reasons for granting the motion.

The petitioner appealed to the Texas Court of Civil Appeals which affirmed the trial court solely on the grounds that the action was barred by the statute of limitations. The court in its opinion stated that there was nothing in the record to show when the suit was filed by the petitioner in Illinois notwithstanding the clear admission of the respondent in its trial court brief that the suit was filed in Illinois in May of 1968, of which the court made no mention. The court also said that there was nothing in the record to indicate that the judgment of the Illinois Supreme Court was ever presented to the trial court and that it was not required to take judicial notice of those proceedings notwithstanding the fact that petitioner had attached to his brief in the trial court a copy of that Illinois Supreme Court opinion, which fact the Texas court, likewise, ignored. The court went on to say that, even if judicial notice were taken of the Illinois Supreme Court opinion, that would not suffice for the date of filing of the suit in Illinois was not recited in that opinion.

Petitioner filed a petition for rehearing in the Court of Civil Appeals which was denied and filed an application for writ of error in the Texas Supreme Court which was denied as above set out.

The federal question was presented at the outset, the complaint alleging a cause of action under the Federal Employers Liability Act, 45 U.S.C. Section 51 et seq.

ARGUMENT

The petitioner in an effort to exercise a right granted him under the Federal Employers Liability Act filed an action against the respondent in May of 1968 in Illinois within six months of the time his cause of action accrued. The respondent filed its motion in Illinois asserting that the Illinois forum was inconvenient to it and, the trial court, notwithstanding the fact that the Illinois forum was most convenient to the plaintiff, did nevertheless dismiss petitioner's action. This dismissal was ultimately affirmed by the Illinois Supreme Court, such affirmance, however, coming in 1971 after the three year statute of limitations had run. Immediately after denial of his petition for rehearing in the Illinois Supreme Court, petitioner refiled the same cause of action in the forum most convenient for the respondent i.e. Dallas, Texas.

Two years later, after extensive preparation for trial and having a trial date assigned, respondent filed a motion for summary judgment in the trial court in Texas alleging fraud in petitioner's application for employment and alleging that the statute of limitations had run against the petitioner barring his bringing of the Texas action. The respondent did not, in the trial court, make any contention that the action had not been timely filed in Illinois and in its brief, on page 14, conceded that the action had been filed in Illinois in May of 1968. Its argument to the trial court dealt primarily with the claimed fraud in the application of employment and with its argument that, notwithstanding the timely filing of the action in Illinois, that filing did not toll the statute of limitations. No contention was made in the trial court that the trial court should not take notice of the Illinois Supreme Court opinion appended to the petitioner's brief filed in the trial court.

The finding of the Texas Civil Court of Appeals that no showing had been made in the trial court as to when the Illinois

action was originally filed and that the Illinois Supreme Court opinion was not brought to the attention of the trial court is directly contrary to the facts as they appear in the record.

The U. S. Supreme Court, in 1965, in *Burnett v. New York Central Railroad*, 380 U.S. 424, definitively set out the law which controls the instant action. In that case the petitioner's Federal Employers Liability Act action had been dismissed in the Ohio court on account of improper venue. The petitioner there recommenced his action in the United States District Court after the three year limitation period had run, which suit was dismissed by the District Court. The dismissal was affirmed by the Circuit Court of Appeals but the Supreme Court held that state statutes do not apply where the question is one of tolling the federal statute of limitations. The court said at 380 U.S. 429:

> "Considerations in favor of tolling the federal statute of limitations in this case are similar to those leading to an extension of the limitation period in the cases mentioned above. Petitioner here did not sleep on his rights but brought an action within the statutory period in a state court of competent jurisdiction. Service of process was made upon the respondent notifying him that petitioner was asserting his cause of action . . . respondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware the petitioner was actively pursuing his FELA remedy; in fact, respondent appeared specially in the Ohio court to file a motion for dismissal on grounds of improper venue."

At page 434, the court said:

> "Finally, the humanitarian purpose of the FELA makes clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitations is served in doing so.

> "These considerations thus lead us to conclude that when a plaintiff begins a timely FELA action in a state court having jurisdiction, and serves the defendant with process and plaintiff's case is dismissed for improper venue, the FELA limitation is tolled during the pendency of the state suit. We believe that the interests of uniformity embodied in the Act are best served by holding that this rule, tolling the statute, applies in all States regardless of whether or not a State has a 'saving' statute."

At page 435:

> "We conclude that a uniform rule tolling the federal statute for the period of the pendency of the state court action and until the state court dismissal order becomes final is fair to both plaintiff and defendant, carries out the purposes of the FELA, and best serves the policies of uniformity and certainty underlying the federal limitation provision."

Clearly, the case having been originally filed in May of 1968, the statute of limitations was tolled during the period of time between May, 1968, and October, 1971. It did not recommence running until October 4, 1971, at which time the decision of the Illinois Supreme Court became final. The filing of his action on October 12, 1971, in Dallas was clearly within the period of time allowed by the *Burnett* decision.

The Court of Civil Appeals for the Fifth Supreme Judicial District of Texas has taken a view of the law not consistent with the *Burnett* opinion. It arbitrarily decided that under Texas procedural law neither it nor the trial court were required to take judicial notice of an opinion of its sister state, Illinois, notwithstanding Rule 184A of the Texas Rules of Civil Procedure providing that:

> "The judge upon motion of either party shall take judicial notice of the common law, public statutes, and court decisions of every other state, territory, or jurisdiction of the United States."

And notwithstanding the fact that the Illinois Supreme Court opinion was brought to the attention of the court, appropriately, the petitioner's brief filed in opposition to the motion for summary judgment before the trial court.

The Court of Civil Appeals of Texas, to reach its conclusion had not only to ignore the admission of the respondent in the trial court that this case was filed in Illinois in May of 1968 but had also to ignore both the Illinois Appellate and Supreme Court opinions. It did the latter by denying that the Supreme Court of Illinois opinion had ever been brought to the attention of the trial court but by also stating that even had the opinion been presented to the trial court, the opinion "does not recite when the suit was originally filed by appellant in the trial court in Illinois. It therefore falls short of evidencing a full period of time during which the statute of limitation would have been tolled. It does nothing more than raise an inference that the suit might have been filed at such time as would sufficiently toll the statute."

The Illinois Supreme Court opinion was filed on May 21, 1971. This would have been six months and fourteen days after the three year statute of limitation would have expired on December 7, 1970. To conclude that this case could have made its way through the trial court, through the Appellate Court and through the Supreme Court of Illinois in six months time is to ignore all rational experience or knowledge of the trial and appellate procedure which exists in every jurisdiction in the United States. The Illinois Supreme Court opinion referred to by the Texas Civil Court of Appeals quotes from and cites the pages of the Illinois Appellate Court opinion dealing with this

matter. The Appellate Court opinion so cited and referred to was filed on June 26, 1970. At that time the petitioner had nearly six months yet remaining in which he could file his action in Texas had it not been that the Illinois Appellate Court reversed the trial court judgment of dismissal.

We respectfully suggest that the conclusion of the Texas Court of Civil Appeals is not supported by the facts presented to it in the Texas trial court record nor by the facts presented to it in the two Illinois opinions. For the convenience of the court, copies of both the Illinois Supreme and Appellate Court opinions have been appended to this petition.

CONCLUSION

It is inconceivable to the plaintiff that even though he filed his action nearly seven years ago, only six months after the occurrence, that his right to recovery could be thwarted on the grounds that it was not timely filed. He knows that while he had the right to file his action initially in Illinois as the forum of his choice especially in view of the fact that his operation had occurred there and while he understands that the respondent had the right to object to that forum and even understands how the respondent could ultimately prevail in Illinois in such objection, there is no way that the petitioner can understand why, after prompt refiling of the action in Dallas where the respondent wanted the action filed at the outset, he should still be denied his right to proceed to a trial before a jury. He believes, as he argued below, that the respondent should be estopped from asserting the statute of limitations as a defense and he believes that even if the Texas Court of Civil Appeals properly refused to take note of those matters that were contained in the trial court brief, still nevertheless, it must take judicial notice of the Illinois proceedings and acknowledge that the plaintiff's

action was timely filed. The petitioner does therefore pray that his petition will be granted.

Respectfully submitted

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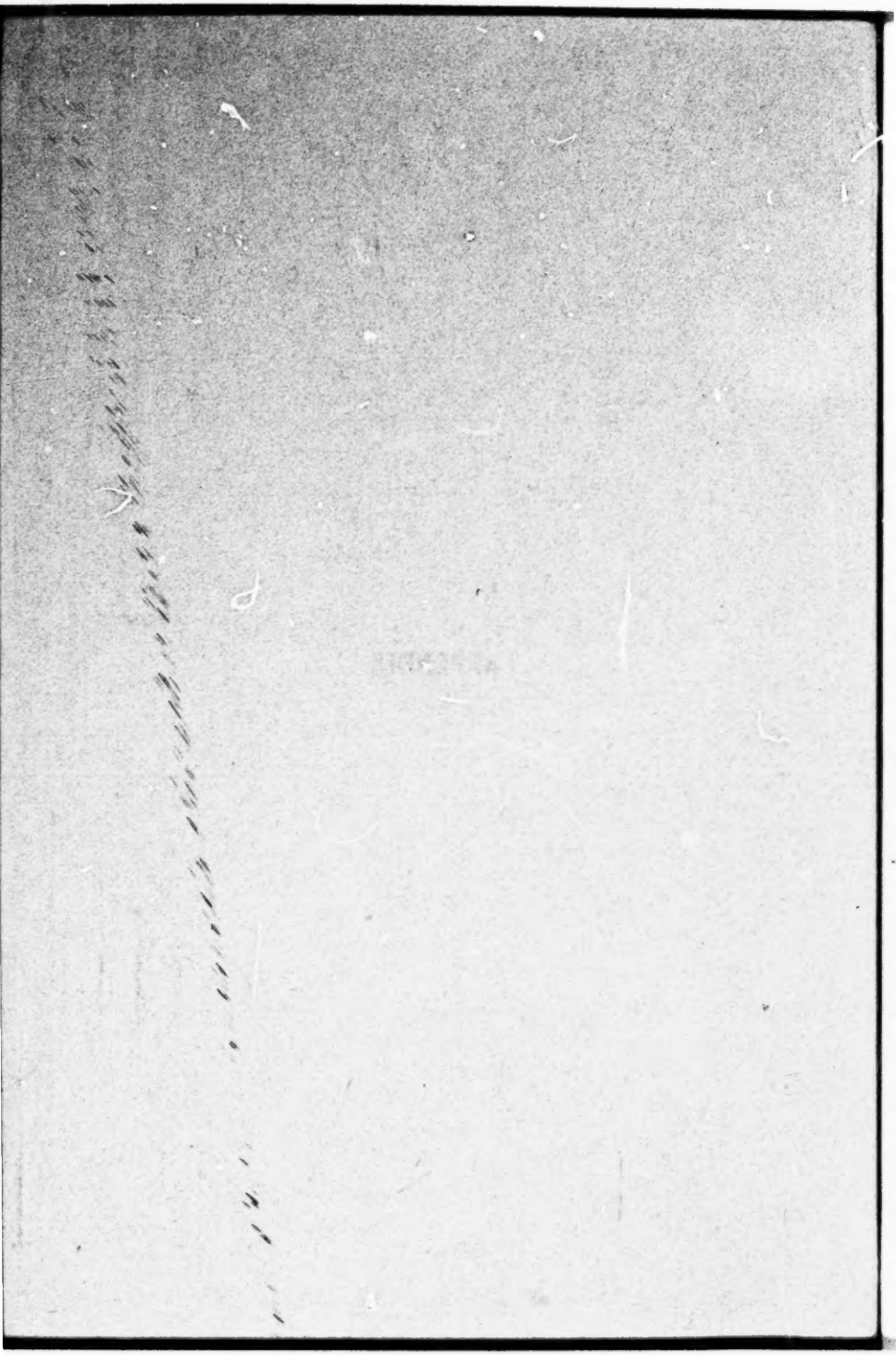
APPENDIX



No. 71-10756-E

Donald G. Fender, vs. St. Louis Southwestern Railway Company.	In the 101st Judicial District Court of Dallas County, Texas

JUDGMENT

On the 6th day of September, 1973, came on for hearing the Motion of Defendant, St. Louis Southwestern Railway Company, for Summary Judgment, and came both Plaintiff and Defendant by and through their respective attorneys of record and announced ready, and the Court, after examining the pleadings, Motion for Summary Judgment and reply thereto and the evidence and hearing the argument of counsel, being of the opinion that the facts and law are with the Defendant and against the Plaintiff, and that Defendant's Motion for Summary Judgment should be granted, it is, accordingly,

Ordered, Adjudged and Decreed that Defendant's Motion for Summary Judgment on file herein be, and the same hereby is, in all respects, granted; and it is

Further Ordered, Adjudged and Decreed that Plaintiff, Donald G. Fender, recover nothing of and from Defendant, St. Louis Southwestern Railway Company, by his suit herein and that the above-entitled and numbered cause be, and the same hereby is, dismissed with all costs of court herein taxed against the Plaintiff, Donald G. Fender, for which let execution issue, to all of which Plaintiff excepted and duly gave notice of appeal.

Signed, Rendered and Entered this 28 day of December, 1973.

/s/ J. ROLL FAIR
Judge

NOTICE OF DECISION

Court of Civil Appeals
Fifth Supreme Judicial District
Jeannette Johnson, Clerk

Dallas, Texas, June 6, 1974

Alfred W. Ellis
Dallas, Texas

Sir:

You are hereby notified that, in the case of Donald G. Fender vs. St. Louis Southwestern Railway Co., our No. 18340, from Dallas County, the following decision and order was this day made and entered by this Court:

The judgment of the court below is affirmed with costs assessed against appellant.

A copy of the Court's opinion is attached.

Respectfully yours,

JEANNETTE JOHNSON, Clerk
Court of Civil Appeals, Fifth Supreme
Judicial District of Texas

From a District Court of
Dallas County, Texas

Donald G. Fender,
Appellant,
vs.
St. Louis Southwestern Railway Company,
Appellee.
No. 18340

Donald G. Fender appeals from a take-nothing summary judgment against him in his action against St. Louis Southwestern Railway Company based upon the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60 (1972). Two questions are presented: (1) Did the trial court err in sustaining the motion for summary judgment filed by the railway company on the ground that Fender's cause of action was barred by the statute of limitations, and (2) Should the trial court have taken judicial notice of court proceedings in the state of Illinois which may have tolled the statute of limitations? We answer each of these questions in the negative and affirm the judgment.

On December 7, 1967, Donald G. Fender was injured while acting within the scope of his employment for St. Louis Southwestern Railway Company at Dallas, Texas. The present action was filed by Fender in the 101st Judicial District Court of Dallas County, Texas on October 12, 1971. The Federal Employers Liability Act under which this action was brought provides that such action must be instituted within three years from the date of accident. 45 U.S.C. § 56 (1972). Appellee railway company filed its motion for summary judgment, as well as its amended motion for summary judgment, based upon the ground that the cause of action was barred by the statute of limitations and also

that certain material representations made by Fender in his application for employment precluded him from recovery under the FELA. Fender did not file an answer to the motion for summary judgment nor did he present any summary-judgment evidence to oppose the motion. The court sustained the motion and entered judgment denying Fender any recovery.

The action of the trial court was based solely upon Rule 166-A of the Texas Rules of Civil Procedure dealing with summary judgments. The rule provides, in part, that judgment

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Our Supreme Court in Gardner v. Martin, 162 Tex. 156, 345 S.W.2d 274 (1961), stated that summary judgment is possible in this state only by virtue of the provisions of Rule 166-A and therefore a party, to recover summary judgment, must strictly comply with the provisions of the rule. Thus it is elementary that the trial court, in considering a motion for summary judgment, is charged with the duty and obligation of considering only the record as it appears before the court at the time of the hearing. Richman Trusts v. Kutner, 504 S.W.2d 539 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.); Whitney Properties Corp. v. Moran, 494 S.W.2d 587 (Tex. Civ. App. — Dallas 1973, no writ); Womack v. I. & H. Dev. Co., 433 S.W. 2d 937 (Tex. Civ. App.—Amarillo 1968, no writ); McCormick v. Stowe Lumber Co., 356 S.W.2d 450 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.), and Dipp v. Rio Grande Produce, Inc., 330 S.W.2d 700 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.).

The summary-judgment record before the trial court consisted of pleadings filed by appellant Fender, which affirmatively re-

vealed that his suit to recover under the FELA had been filed more than three years after the date of injury and was therefore *barred by the express provisions of the Federal Employers Liability Act*, and appellee's pleading and motion for summary judgment, which raised the limitation defense. In this posture of the case it was incumbent upon appellant Fender the opponent to the motion for summary judgment, to come forward with appropriate summary-judgment evidence to show that the affirmative defense of limitations would not apply. Nichols v. Smith, 507 S.W.2d 518 (Tex. 1974); "Moore" Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934 (Tex. 1972); Kuper v. Schmidt, 161 Tex. 189, 338 S.W.2d 948 (1960), and Gulf C & S.F. R.R. v. McBride, 159 Tex. 442, 322 S.W.2d 492 (1958). In Nichols and Smith, *supra*, the supreme court dealt with a very similar situation and held:

> [T]he defense of the statute of limitations is established by the record as a matter of law, and petitioners are relying on fraudulent concealment to avoid that defense. It was their burden, therefore, to come forward with proof raising an issue of fact with respect to fraudulent concealment. Since they failed to do so, the allegations of fraudulent concealment do not defeat respondent's right to a summary judgment.

Appellant made no effort to introduce affidavits, certified copies of official records and judgments evidencing the existence of any proceeding in another state, or any other form of summary-judgment evidence that would serve to create an issue of fact relating to the limitations plea presented by appellee. In the absence of said summary judgment evidence as provided by the rule the trial court was justified in sustaining the motion for summary judgment.

We turn now to the second question presented, that is, whether the trial court should have taken judicial notice of certain judicial proceedings in the state of Illinois which appellant con-

tends would have established the fact that the statute of limitations was tolled. In his *brief*, appellant *states* that in May 1968, following his injury of December 7, 1967, he filed suit against the St. Louis Southwestern Railway Company in the circuit court of St. Clair County, Illinois, seeking recovery under the provisions of the Federal Employers Liability Act. He argues that pursuant to such act he had the right to file this action in the state of Illinois where the railway company carried on its business. Appellant further *states* in his brief that in response to the petition filed in Illinois the railway company filed a motion to dismiss the case based upon the doctrine of *forum non conveniens*. Appellant then *says* that the dismissal of the case upon the doctrine of *forum non conveniens* was affirmed on appeal by a decision of the Illinois Supreme Court in Fender v. St. Louis Southwestern R.R., 49 Ill.2d 1, 273 N.E.2d 353 (rehearing denied October 4, 1971). Appellant attaches a *copy* of the Illinois Supreme Court *opinion* to his *brief in this court*. There is nothing in the record before us to indicate that any of these facts set forth in the brief before us were presented in any manner to the trial court prior to the ruling on a motion for summary judgment. Neither does the record indicate that the judgment of Illinois Supreme Court was ever presented to the trial court.

It has been held that judicial notice may be employed in summary-judgment proceeding. Marsh v. Millward, 381 S.W.2d 110, 112 (Tex. Civ. App.—Austin, 1964, writ ref'd n.r.e.). Judicial notice eliminates the necessity for taking evidence by the usual procedures. Levlon v. Dallas Ry. & Term. Co., 117 S.W.2d 876, 878 (Tex. Civ. App.—Dallas 1938, writ ref'd). However, the matter to be noticed must be appropriate for judicial notice. The procedure for taking judicial notice of the law of a sister-state is prescribed by Rule 184a.[1] Whether

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[1] Tex R. Civ. P. 184a provides in part:

> The judge upon the motion of either party shall take judicial notice of the common law, public statutes, and court decisions

relevant *facts* are appropriate for judicial notice is another question. Aside from the absence here of the motion and notice required by Rule 184a, we are not persuaded that judicial notice under that rule can be extended to foreign judicial records and proceedings which are alleged to have affected specifically the rights of the parties before the Texas court, as distinguished from the law of another state to be found in published statutes and precedents. The Illinois opinion attached to appellant's brief is not relied on to show the *law* of Illinois, but rather the *facts* of the Illinois litigation. The theory of judicial notice is that the fact to be noticed is so notorious or its existence so easily ascertainable that proof will not be required. Levlon v. Dallas Ry. & Term. Co., 117 S.W.2d 876, 878 (Tex. Civ. App.—Dallas 1938, writ ref'd); 1 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE, § 151 at 170 (1956). Sisterstate judicial records and proceedings, like those from one court in this state sought to be introduced in another Texas court, are not matters so easily ascertainable that no proof is required. To be considered as evidence at trial or as summary-judgment proof, authenticated copies of the pertinent records or proceedings must be introduced. Adams v. State Board of Ins., 319 S.W.2d 750, 754 (Tex. Civ. App. Houston 1958, writ ref'd n.r.e.); 2 McCORMICK & RAY, *supra*, § 1278 at 148; 32 C.J.S. *Evidence* § 629 (1964).

It is interesting to note that even if the necessary summary-judgment proof had been made and the trial court had been furnished with properly certified copies of the opinion of the Supreme Court of Illinois, such would not have constituted sufficient evidence to overcome the bar of the statute of limitations in this case. The uncertified copy of the opinion of the Supreme Court of Illinois attached to appellant's brief in this

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of every other state, territory, or jurisdiction of the United States. Any party requesting that judicial notice be taken of such matter shall furnish the judge sufficient information to enable him properly to comply with the request. . . .

court, but which was not presented to the trial court in any manner, does not recite *when* the suit was originally filed by appellant in the trial court in Illinois. It therefore falls short of evidencing the full period of time during which the statute of limitation would have been tolled. It does nothing more than raise an inference that the suit might have been filed at such time as would sufficiently toll the statute. Such an inference would fall short of raising a fact issue on a summary-judgment proceeding.

Since we hold that the trial court correctly sustained the motion for summary judgment based upon the ground of statute of limitations, it becomes unnecessary for us to discuss or pass upon the other ground in support of the motion for summary judgment.

Appellant's point of error is overruled and the judgment of the trial court is affirmed.

/s/ CLAUDE WILLIAMS
Chief Justice

Delivered:

June 6, 1974

Bateman, J., Not sitting.

In the Supreme Court of Texas

November 13, 1974.

No. B-4817.

Donald G. Fender

vs.

St. Louis Southwestern Railway Company.

From Dallas County, Fifth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Donald G. Fender, pay all costs incurred on this application.

125 Ill.App.2d 211

Donald G. Fender, Plaintiff-Appellant,

v.

St. Louis Southwestern Railway Company,
Defendant-Appellee.

Gen. No. 69-43.

Appellate Court of Illinois
Fifth District

June 26, 1970

Per Curiam.

Plaintiff appeals from the judgment of the Circuit Court of St. Clair County dismissing his cause of action and assessing costs against him entered upon allowance of defendant's "Motion to Decline Jurisdiction" under the doctrine of forum non conveniens.

Plaintiff's complaint pleads a cause of action under the Federal Employers' Liability Act (45 U.S.C.A. section 51 et seq.) arising out of an occurrence in the Dallas, Texas Yards of the Southern Pacific Railroad.

In its motion to decline jurisdiction defendant states that plaintiff is a resident of Dallas, 870 miles from Belleville, and at the time of the alleged occurrence had been in defendant's employ for approximately 10 days; defendant is a Missouri corporation with its principal place of business in Tyler, Texas and is amenable to service and has property subject to execution in Texas; in order to try the case in St. Clair County de-

fendant would require the testimony of both employee and non-employee witnesses, nearly all of whom reside in the vicinity of Dallas; it could not compel the attendance of witnesses by subpoenas, would be required to take evidentiary depositions and expend substantial sums for the expenses of travel and maintenance; defendant would be placed at a disadvantage and would incur great expense in that witnesses would be required to be in attendance at the trial whose presence might become unnecessary and that this could not be determined until plaintiff had introduced evidence in support of his case; testimony by evidentiary deposition is not as satisfactory and convincing to a jury as testimony "in person" of the witnesses; defendant would incur additional expense of $1,000.00 to $2,000.00; defendant's attorneys would be required to make several trips to Dallas for the purpose of inspecting the site of the occurrence and taking depositions; plaintiff's physical condition is in issue, he has had a series of lawsuits and 10 to 14 doctors have treated him and testified concerning his condition in previous litigation; upon information and belief defendant states that plaintiff's reason for filing his suit in "this remote jurisdiction" is to put defendant to a disadvantage in proving plaintiff's prior claimed accidents and the alleged injuries arising therefrom; that a further defense will be that plaintiff is not entitled to the benefits of the F.E.L.A. for the reason that he made material misrepresentations of fact in his application for employment, and various persons would be necessary witnesses in support of this defense; the testimony of a number of doctors, eight of whom are listed by name will be necessary to defendant's defense. Paragraph 12 of the motion states:

> "12. The accessibility of the courts of St. Clair County has become widely known and local litigants and litigants who live in or near the area of this forum, have filed many suits in this Court requiring almost continuous attendance by the judges of this Court in an effort to dispose of the

litigation. In many cases the courts of this county afford the only forum where local residents may try their suits and foreign, imported litigation such as this, tends to discommode the citizens and residents of Illinois who have no other choice of forum. The time of the Court and jury which could be devoted to local cases will be appropriated by the plaintiff in this suit with no corresponding benefits to the taxpayers of this county. The plaintiff has other appropriate courts available to him elsewhere in close proximity to the place where this cause of action arose, which are convenient for him, the witnesses and the defendant, and where witnesses can be subpoenaed."

The motion is verified, upon information and belief by one of defendant's attorneys of record.

Plaintiff filed verified "Objections to Motion to Decline Jurisdiction" in which he states defendant has hundreds of miles of track in Illinois and maintains yards, offices and other facilities in St. Clair County; there are only two witnesses to the occurrence out of which the action arises, plaintiff and his foreman; that a myelogram and laminectomy were performed on plaintiff in St. Clair County by physicians resident there; various doctors, nurses and pathologists are necessary to prove his case, all of whom reside in Illinois; his attorney is licensed in Illinois, not in Texas, and resides in St. Clair County; if defendant is caused unreasonable and unnecessary expenses he is ready to deposit any sums necessary to defray such expense; matters in defendant's motion referring to his background are scurrilous and untrue; the Circuit Court of St. Clair County does not have a large backlog of cases and the filing of this case "will in no way discommode the citizens and residents of this County."

Defendant filed the affidavit of the attorney who verified its motion in which he states that the surgeon who operated on

plaintiff is dead; plaintiff has had several lawyers in Texas to prosecute damage suits; he presently has a Texas lawyer who is presently prosecuting a case in Texas seeking to recover Workmen's Compensation for an injury suffered while plaintiff was employed by Rotex Manufacturing Co. in Dallas County.

Plaintiff contends defendant's motion "failed to state facts sufficient to give the court latitude in which to exercise its discretionary power," and the court, in declining jurisdiction, abused its discretion. Defendant argues the trial court properly declined jurisdiction, its action was discretionary, and is subject to reversal only if there is shown to be an abuse of discretion.

In Whitney v. Madden, 400 Ill. 185, 79 N.E.2d 593, 595, the Supreme Court affirmed the dismissal of a case under the doctrine of forum non conveniens and after discussing certain limitations previously applied to free access to the courts of Illinois, said at page 189, 79 N.E.2d at page 595: "Many jurisdictions have added the limitation that if it is apparent that an appropriate forum is available and the relief is sought in the local courts by a nonresident against a nonresident for a transaction which occurred outside the territorial boundaries of the State, for the purpose of frustrating the defendant, or if the bringing of the action unduly burdens the defendant or causes him great and unnecessary inconvenience, or unnecessarily burdens the court, the trial court may, in its discretion, decline the jurisdiction of the case, even though it may have proper jurisdiction over all parties and the subject matter involved. This is the doctrine of forum non conveniens. The Federal courts have recognized the application of this doctrine and have found it not repugnant to section 2 of article IV, and section I of the fourteenth amendment to the constitution of the United States."

In Cotton v. L. & N. R.R. Co., 14 Ill.2d 144, 152 N.E.2d 385, the Supreme Court limited the application of the doc-

trine in cases arising under the F.E.L.A. in the following language found at page 174, 152 N.E.2d at page 400: "If the companies are actually harassed and the plaintiff is prompted by vexation in the choice of a forum, there should be relief, and the courts will grant such relief if the request is candidly and convincingly presented. In other words, section 6 of the Federal Employers' Liability Act gives this plaintiff a right which cannot be overcome by a mere balance of conveniences; that only where it is shown that plaintiff is motivated purely by vexation and harassment will an F.E.L.A. case be dismissed. If it is 'shopping' for a plaintiff to bring suit in a great metropolis where a larger verdict is anticipated, why is it not also 'shopping' for a defendant to attempt to have the case dismissed on the ground that it should have been brought in a small community where the defendant anticipates a smaller verdict would result. This is in accord with the reasoning of Judge Hand in his concurring opinion in Ford Motor Co. v. Ryan, 2 Cir., 182 F.2d 329 (an anti-trust suit under Title 15 of the U.S. Code, which law contains a venue provision comparable to section 6 of the F.E.L.A.), where he said (p. 332): 'I wish to put my vote solely upon the ground that § 15 of Title 15 gives to plaintiff a privilege which a defendant must overcome by more than a bare balance of convenience between the two forums.' "

In The People ex rel. Chesapeake and Ohio Railway Company v. Donovan, 30 Ill.2d 178, 195 N.E.2d 634, the court said at page 180, 195 N.E.2d at page 635: "The statement in the Cotton case, 'that only where it is shown that plaintiff is motivated purely by vexation and harassment will an F.E.L.A. case be dismissed' is disavowed. The appropriate factors to be considered in ruling upon such a motion may be found in Whitney v. Madden, 400 Ill. 185, 79 N.E.2d 593, and in other portions of the Cotton case."

In Whitney the Supreme Court referred with approval to Gulf Oil Co. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed.

1055, and in Cotton, at page 166, 152 N.E.2d at page 396, the court quoted from Gilbert as follows: "However, the predominate rationale of the cases corresponds substantially to the approach of Mr. Justice Jackson in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, where it is stated at page 508, 67 S.Ct. 839: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' " The fact that the Supreme Court in Donovan, while specifically disavowing certain statements in Cotton, made no reference to Gilbert, leads us to conclude that it intended that the language quoted from Gilbert in Cotton remain applicable to the doctrine in Illinois.

[1] From our review of the authorities we conclude that before a motion to decline jurisdiction may be granted it must be apparent that the first three conditions enumerated in Whitney, i.e., the existence of an appropriate forum, the non-residences of the parties, and a transaction which did not take place in Illinois are present along with one or more of the remaining conditions: i.e., the bringing of the action in Illinois for the purpose of frustrating the defendant, the undue burdening of and great and unnecessary inconvenience to the defendant, or the unnecessary burdening of the court. We have searched Cotton for other "appropriate factors to be considered" as suggested in Donovan and except for the one expressly disavowed by the court, fail to find any which modify the requirements enumerated in Whitney.

[2] The review of the trial court's order is governed by the rule that in the absence of an abuse of discretion its ruling should not be disturbed. This matter was presented to the trial court on motions and affidavits and it heard no testimony. The scope of review under these circumstances is well defined in Weeks v. Bareco Oil Co., 125 F.2d 84 (CA—7), wherein the Court of Appeals said at page 93: "We are advised, and accede to the contention that the District Court has a discretion, and

the existence of that discretion narrows the scope of our investigation. The trouble with this irresponsible method of lightly disposing of cases, truly ours, is that discretion and abuse of discretion are relative rather than absolute terms. In most instances, we may say, generally, that the question of discretion is the display of sound judgment. In the proper case it may not be disturbed by an appellate court except for abuse. But what is abuse?

Determination of abuse of discretion involves the exercise, by us, of sound judgment upon the facts. If there is controversy as to facts, and if the facts themselves largely define the wisdom of the discretion, review by the appellate court is seldom effective and it should not be. Then appellate court's review does not include trial court's discretion.

If, however, the facts are not in dispute and it is a question of sound judgment based upon the undisputed facts which are before us as fully as before the trial judge (i.e., by affidavits), we are in about as good a position as he to say whether the discretion has been wisely exercised. In short both trial and appellate courts have the same situation upon which to exercise the same sound judgment."

[3] This court has reviewed, and has presently pending, cases brought under F.E.L.A. and arising from occurrences in other states. From our knowledge of the records in those cases we conclude that although some additional expense may be incurred for travel and maintenance, the absence of subpoena power is not a material factor in compelling the attendance of employee witnesses. In many cases reviewed by this court, both F.E.L.A. and others, much of the medical testimony adduced by both plaintiffs and defendants is that of physicians practicing in St. Louis, Missouri, not amenable to subpoena, and is introduced in the form of evidentiary depositions. With respect to the testimony of non-medical, non-employee wit-

nesses, defendant's motion and affidavit suffer from the deficiencies which appear to have been the deciding factors in Cotton. We conclude therefore, that it is not, as required by the authorities, apparent that the action was brought in Illinois for the purpose of frustrating, unduly burdening, or causing great and unnecessary inconvenience to the defendant. With respect to the question of whether retention of the case is an undue burden on the court, it is noted that both paragraph 12 of defendant's motion (supra) and plaintiff's assertion that "the Circuit Court of St. Clair County does not have a large backlog of cases * * *." (supra), state mere conclusions, there are no facts alleged by either party, and the trial court made no finding on this issue. As to the availability of another appropriate forum we quote from Lonergan v. Crucible Steel Co., 37 Ill.2d 599, 229 N.E.2d 536, wherein at page 606, 229 N.E.2d at page 540, the court said: "Defendants first assert that there is a serious backlog of cases in Cook County which requires reasonable restrictions on shareholders litigation against foreign corporations. This same argument was rejected in Cotton v. Louisville and Nashville Railroad Co., 14 Ill.2d 144, 152 N.E.2d 385. Here, as in the Cotton case, there is no evidence as to the condition of the courts' dockets in any other forum."

In our opinion the record fails to reflect the strong balance in favor of defendant necessary to deprive the plaintiff of his choice of forum. McKinney v. Hougland Towing Co., 109 Ill.App.2d 99, 248 N.E.2d 322. The judgment of the Circuit Court of St. Clair County is therefore reversed, and the cause remanded to the Circuit Court of St. Clair County with directions to vacate its order of dismissal and reinstate plaintiff's cause of action.

Judgment reversed and cause remanded with directions.

49 Ill.2d 1

Donald G. Fender, Appellee.

v.

St. Louis Southwestern Railway Company, Appellant.

No. 43420.

Supreme Court of Illinois.

May 21, 1971.

Rehearing Denied Oct. 4, 1971.

Schaefer Justice.

This is an action under the Federal Employers Liability Act instituted by Donald G. Fender against St. Louis Southwestern Railway Company in the circuit court of St. Clair County. The complaint alleged that the occurrence out of which the action arose took place in Dallas, Texas. The defendant filed a motion to dismiss *forum non conveniens*, pointing out the fact that the place where the accident was alleged to have occurred is 870 miles from East St. Louis, Illinois, where the action was filed, and that the disposition of cases in the circuit court of St. Clair County is delayed by reason of the extraordinarily large number of actions filed there. The circuit court granted the motion to dismiss. The Appellate Court, Fifth District, reversed (125 Ill. App.2d 211, 260 N.E.2d 373), and we granted leave to appeal.

The positions of the parties were thus summarized by the appellate court:

"In its motion to decline jurisdiction defendant states that plaintiff is a resident of Dallas, 870 miles from Belleville, and at the time of the alleged occurrence had been in defendant's employ for approximately 10 days; defendant is a Missouri corporation with its principal place of business in Tyler, Texas and is amenable to service and has property subject to execution in Texas; in order to try the case in St. Clair County defendant would require the testimony of both employee and non-employee witnesses, nearly all of whom reside in the vicinity of Dallas; it could not compel the attendance of witnesses by subpoenas, would be required to take evidentiary depositions and expend substantial sums for the expense of travel and maintenance; defendant would be placed at a disadvantage and would incur great expense in that witnesses would be required to be in attendance at the trial whose presence might become unnecessary and that this could not be determined until plaintiff had introduced evidence in support of his case; testimony by evidentiary deposition is not as satisfactory and convincing to a jury as testimony 'in person' of the witnesses; defendant would incur additional expense of $1,000 to $2,000; defendant's attorneys would be required to make several trips to Dallas for the purpose of inspecting the site of the occurrence and taking depositions; plaintiff's physical condition is in issue, he has had a series of lawsuits and 10 to 14 doctors have treated him and testified concerning his condition in previous litigation; upon information and belief defendant states that plaintiff's reason for filing his suit in 'this remote jurisdiction' is to put defendant to a disadvantage in proving plaintiff's prior claimed accidents and the alleged injuries arising therefrom; that a further defense will be that plaintiff is not entitled to the benefits of the F.E.L.A. for the reason that he made material misrepresentations of fac' in his application for employment, and various persons would be necessary witnesses in support of this defense; the testimony of a number of doctors, eight of whom are listed by name will be necessary to defendant's defense.

* * * * * * *

"Plaintiff filed verified 'Objections to Motion to Decline Jurisdiction' in which he states defendant has hundreds of miles of track in Illinois and maintains yards, offices and other facilities in St. Clair County; there are only two witnesses to the occurrence out of which the action arises, plaintiff and his foreman; that a myelogram and laminectomy were performed on plaintiff in St. Clair County by physicians resident there; various doctors, nurses and pathologists are necessary to prove his case, all of whom reside in Illinois; his attorney is licensed in Illinois, not in Texas, and resides in St. Clair County; if defendant is caused unreasonable and unnecessary expenses he is ready to deposit any sums necessary to defray such expense; matters in defendant's motion referring to his background are scurrilious and untrue; the Circuit Court of St. Clair County does not have a large backlog of cases and the filing of this case 'will in no way discommode the citizens and residents of this County.' " 125 Ill. App.2d at 212-214, 260 N.E.2d at 373-374.

In addition, the opinion of the appellate court set out in full the paragraph of the defendant's motion which asserted that appropriate courts are available to the plaintiff in close proximity to the place where the cause of action arose, and that "imported litigation such as this, tends to discommode the citizens and residents of Illinois who have no other choice of forum. The time of the Court and jury which could be devoted to local cases will be appropriated by the plaintiff in this suit with no corresponding benefit to the taxpayers of this county."

The discretion to be exercised in ruling on a *forum non conveniens* motion is that of the trial court. (Whitney v. Madden (1948), 400 Ill. 185, 190, 79 N.E.2d 593; People ex rel. Chesapeake and Ohio Railway Co. v. Donovan (1964), 30 Ill.2d 178, 180, 195 N.E.2d 634). In this case the appellate court reversed the trial court, apparently not because that court had abused its discretion, but because the appellate court felt that the trial court's discretion had not been "wisely exercised." In our opin-

ion the appellate court misapprehended its role and misapplied the governing principles.

In its opinion the appellate court stated: "We conclude therefore that it is not, as required by the authorities, apparent that the action was brought in Illinois for the purpose of frustrating, unduly burdening, or causing great and unnecessary inconvenience to the defendant." (125 Ill.App.2d at 219, 260 N.E.2d at 377.) But the idea that such a showing is required before a motion to dismiss *forum non conveniens* may be granted was specifically repudiated by this court in People ex rel. Chesapeake and Ohio Railway Co. v. Donovan, 30 Ill.2d 178, 195 N.E.2d 634. There we said: "The statement in the Cotton case, 'that only where it is shown that the plaintiff is motivated purely by vexation and harassment will an F.E.L.A. case be dismissed' is disavowed." 30 Ill.2d at 180, 195 N.E.2d at 635.

Another matter that received primary emphasis in the opinion of the appellate court is that the record does not show the condition of the dockets of other courts. The court said: "As to the availability of another appropriate forum we quote from Lonergan v. Crucible Steel Co. [of America], 37 Ill.2d 599, 229 N.E.2d 536, wherein at page 606, 229 N.E.2d at page 540, the court said: 'Defendants first assert that is a serious backlog of cases in Cook County which requires reasonable restrictions on shareholders litigation against foreign corporations. This same argument was rejected in Cotton v. Louisville and Nashville Railroad Co., 14 Ill.2d 144, 152 N.E.2d 385. Here, as in the Cotton case, there is no evidence as to the condition of the courts' dockets in any other forum.' " 125 Ill.App.2d at 219, 260 N.E.2d at 377.

The availability of an appropriate forum is a factor to be considered in ruling upon a motion to dismiss *forum non conveniens*. (Whitney v. Madden, 400 Ill. 185, 189, 79 N.E.2d 593.) But the kind of "availability" that is involved is the capacity of the forum to obtain jurisdiction and grant relief. The no-

tion of an available forum, in connection with the doctrine of *forum non conveniens*, is not related to the condition of the dockets of the courts in other jurisdictions, and the proponent of such a motion is not required to support his motion with a comparative statistical analysis of the degree of calendar congestion in the forum and in other jurisdictions.

A significant consideration in ruling upon such a motion is, of course, the condition of the calendar in the forum in which the action is pending. Concerning that consideration, the appellate court said: "With respect to the question of whether retention of the case is an undue burden on the court, it is noted that both paragraph 12 of defendant's motion (supra) and plaintiff's assertion that 'the Circuit Court of St. Clair County does not have a large backlog of cases * * *' (supra) state mere conclusions, there are no facts alleged by either party and the trial court made no finding on this issue." 125 Ill.App.2d at 219, 260 N.E.2d at 377.

The condition of the docket of the circuit court of St. Clair County, however, was not a fact difficult of ascertainment and was a matter of which the circuit court could properly take judicial notice. The pertinent reports are on file in the office of the Court Administrator, and they show that during the years 1967-1969 the average delay from date of filing to date of verdict in civil cases in the 20th circuit, which includes St. Clair County, has ranged from 22.5 months to 21.7 months. In our opinion the circuit court, confronted with this very serious delay in the disposition of civil cases, was fully justified in granting the motion to dismiss.

The judgment of the appellate court is reversed, and the judgment of the circuit court is affirmed.

Appellate Court reversed; circuit court affirmed.

Goldenhersh, J., took no part in the consideration or decision of this case.

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In The

Supreme Court of the United States

No. 74-997

DONALD G. FENDER,

Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Objection to Jurisdiction	1
Statement of the Case	3
Argument	4
Conclusion	9

Cases **Page**

Adam vs. Saenger, 303 US 59, 58 S. Ct. 454, 82 L. Ed. 649 (1938) 8

Adams vs. State Board of Ins., 319 SW2d 750, 754 (Tex. Civ. App. — Houston, 1958, writ ref'd, n.r.e. 5

Adrickes vs. Kress & Co., 398 US 144, 90 S. Ct. 1958, 26 L. Ed. 2d 142 (1970) 8

Barney vs. Credit Plan Corporation, 403 SW2d 230 (Tex. Civ. App. — San Antonio, 1964, no writ) 6

Burnett vs. New York Central Railroad Company, 380 US 424 (1965) 2

Gardner vs. Martin, 345 SW2d 274 (Tex. 1961) 5

Hanley vs. Donoghue, 116 US 1, 6 S. Ct. 242, 29 L. Ed. 535 (1885) 8

Hedgebeth vs. North Carolina, 334 US 806, 68 S. C. 1185, 92 L. Ed. 1739 (1948) 8

Henry vs. State of Mississippi, 379 US 443, 85 S. Ct. 564, 13 L. Ed. 2nd 408 (1965) 3

Levlon vs. Dallas Ry. & Term. Co., 117 S.W.2d 876, 878 (Tex. Civ. App. — Dallas 1938, writ ref'd) 7

Mutual Life Insurance Company of New York vs. McGrew, 118 US 291, 23 S. Ct. 375, 47 L. Ed. 480 (1903) 7

Nichols vs. Smith, 507 SW 2nd 518 (Tex. 1974) 4

Ohio Bell Telephone Co. vs. Public Utilities Commission of Ohio, 301 US 292, 57 S. Ct. 728, 81 L. Ed. 1093 (1937) 7

Reimer vs. Lee & Bulah Moor Children's Home, 473 SW 2d 349 (Tex. Civ. App. — El Paso, 1971 aff'd 476 SW 2d 665 5

Rohner vs. Union Pacific Railroad Company, 225 F2d 272, 274-275 (CCA-10th Cir., 1955) 4

Page

Schland vs. Schland, 415 SW2d 28 (Tex. Civ. App. — Houston 1967, writ ref'd, n.r.e.) 6

Shapleigh vs. Mier, 299 US 468, 57 S. Ct. 261, 81 L. Ed. 355 (1937) 7

Statutes

Title 28, Section 1257 (3), United States Code 2

Title 45, Section 56, United States Code 4

Rules

Rule 24(2), United States Supreme Court Rules 1

Rule 19(A), United States Supreme Court Rules 2

Rule 184A, Texas Rules of Civil Procedure 6

Rule 371, Texas Rules of Civil Procedure 6

Secondary Authorities

2 McCormick & Ray, Texas Law of Evidence, §1278 at 148 6

32 C.J.S. Evidence 629 (1964) 6

4 Tex. Jur. 2d, Rev., Part 2, Pages 310 to 311 (1974) 6

1 McCormick & Ray, Texas Law of Evidence, §151 at 170 (1956) 7

4A C.J.S. §702 Appeal & Error 530 (1957) 8

5 C.J.S. §1480(c) Appeal & Error 749-750 (1958) 8

In The

Supreme Court of the United States

No. 74-997

DONALD G. FENDER,

Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your respondent, St. Louis Southwestern Railway Company, respectfully files this its Brief in Opposition to the Petition for Writ of Certiorari, for the purpose of presenting to this Court certain matters and grounds showing why this cause should not be reviewed by this Court. Respondent prays that the Petition be in all respects denied.

OBJECTION TO JURISDITION

Respondent respectfully objects to the jurisdiction of this Court to grant Writ of Certiorari herein. Rule 24(2) Sup. Ct. Rules. From a review of the official opinion of the Court of

Civil Appeals, Fifth Supreme Judicial District of Texas, (pages A-8, Appendix to Petitioner's Brief), it is clear that the Texas Courts did not decide any "federal question of substance". Rule 19 (A) Sup. Ct. Rules. Nor was the validity of a statute of the United States drawn in question. Title 28, United States Code, Section 1257 (3).

The question presented by Petitioner in his brief involves whether Texas Courts should have taken judicial notice of certain *factual* matters involved in a suit filed in the State of Illinois. This question was never before, or reached by, the Texas trial court. No evidence of the Illinois proceeding, to which Petitioner refers in his brief, was presented to the trial court and has never been a part of the record herein. No request was made of the trial court that it take judicial notice of such proceeding.

The trial court granted Summary Judgment based upon the uncontradicted proof before it that more than three years had elapsed between the date of Petitioner's alleged injury and the filing of suit. Petitioner had the burden to properly raise a fact issue regarding this affirmative defense. Since other Court proceedings were not before the trial court, the question which Petitioner *now* seeks to present is not properly a subject for consideration, and the trial court's decision, affirmed in all respects by the Texas appellate courts, therefore raises no federal question to be reviewed here. The Judgment of the trial court and the decision of the Texas Court of Civil Appeals do not, as suggested by Petitioner, conflict with ***Burnett v. New York Central Railroad Company***, 380

U.S. 424 (1965). The *Burnett* case did not involve questions of *proof* or authenticity of other judicial proceedings.

The Judgment entered in the trial court was not based on the construction of a federal statute, but rather upon a determination of fact, and the failure of Petitioner to offer any evidence in response to the clear proof of limitations. The Judgment rests on adequate and independent state grounds and this Court should therefore decline to review it. *Henry* vs. *State of Mississippi*, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2nd 408 (1965).

STATEMENT OF THE CASE

Respondent cannot adopt Petitioner's Statement of the Case because it contains recitations of alleged factual matters that were not before the trial court, the Texas Court of Civil Appeals, or the Texas Supreme Court and are not supported in the record now before this Court. More specifically, Petitioner's recitations concerning the filing of suit in Illinois, the actions of the parties there, the time Petitioner filed suit there and the time of denial of a Petition for Rehearing in Illinois are outside the record in this case.

Petitioner filed his Original Petition in the District Court in Dallas, Texas on October 12, 1971. He pled and testified that his alleged injury occurred on December 7, 1967. More than three years had elapsed between the date of the injury and the filing of this cause. Respondent's Motion for Summary Judgment urged that Petitioner failed to institute this proceeding within the applicable statute of limitations period and

that Petitioner's action was barred by limitation. Petitioner filed no reply to Respondent's Motion and did not ask leave to amend his pleadings. Petitioner filed no counter-affidavits, or documents, and offered no other evidence in rebuttal of Respondent's Motion.[1]

As is clear from the record, no Motion was made by Petitioner to the trial court asking that Court to take judicial notice of any proceeding in another state.

ARGUMENT

The record before the trial court consisted of Petitioner's pleading which clearly revealed that his suit had been filed more than three years after the date of injury. Respondent raised the affirmative defense that the suit was barred by federal statute which requires that Petitioner's cause be commenced within three years from the day the cause of action accrued. Title 45, United States Code, Section 56. As acknowledged by the Texas Court of Civil Appeals in its opinion (Petitioner's Appendix Page A-5), it was incumbent upon Petitioner "to come forward with appropriate Summary-Judgment evidence to show that the affirmative defense of limitations would not apply", (citing *Nichols vs. Smith*, 507 SW 2nd, Tex. 1974 and numerous other Texas cases). In *Rohner* vs. *Union Pacific Railroad Company*, 225 F2d 272

[1]Petitioner refers in his Statement to certain briefs allegedly filed by the parties in the trial court and to an Illinois Court opinion. These matters were not on file or in evidence in the trial court at the time the Court heard Respondent's Motion for Summary Judgment, were not designated by Petitioner for inclusion in the transcript, and were not included in the record of this case on appeal.

(CCA-10th Cir., 1955), an employee, as is the case here, sued under the Federal Employee's Liability Act to recover for an alleged injury, his complaint, as here, disclosing that injury occurred more than three years prior to commencement of the action. The defendant Railroad moved to dismiss and asked for Summary Judgment. There the Court held:

> "The complaint in question disclosed that the asserted cause of action had its inception more than eight years prior to the time the case was filed; and, when Defendant, by motion, admitted all facts well-pleaded, *it then became incumbent upon Plaintiff to demonstrate to the trial court that, although not shown by the present state of the pleadings, a material issue of fact existed. Plaintiff's failure left the fact undisputed,* and the court had no alternative as a matter of law but to render summary judgment for the Defendant . . ." *A complainant under the Federal Employee's Act must allege and prove the action has been instituted within the prescribed time, Carpenter* vs. *Erie Railroad Co., 3 Cir.,* 1954, 132 F2nd 362." (Emphasis added).

Petitioner did not introduce affidavits or certified copies of official records evidencing the existence of any proceeding in another state. He introduced no evidence creating an issue of fact relating to the limitations defense. The Texas Courts consistently have held that in order for a foreign judgment to be considered as part of summary judgment evidence, a *sworn or certified copy* of said judgment would necessarily have to be in evidence and before the court in admissible form. *Gardner vs. Martin,* 345 SW2d 274 (Tex. 1961); *Reimer vs. Bulah Moor Children's Home,* 473 SW2d 349 (Tex. Civ. App. — El Paso, 1971) aff'd 476 SW2d 665; *Adams vs. State Board of Ins.,* 319 SW2d 750, 754 (Tex. Civ. App. — Houston, 1958,

writ ref'd, n.r.e.); 2 McCormick & Ray, *Texas Law of Evidence*, §1278 at 148; 32 *C. J. S. Evidence* 629 (1964).

As acknowledged by the Court of Civil Appeals, there was nothing in the record to indicate that a judgment of the Illinois Supreme Court was ever presented to the trial court and, nothing in the record to indicate that Petitioner requested the trial court to take "judicial notice" of proceedings in another state, as required by the *Texas Rules of Civil Procedure*, Rule 184A. The trial court was "charged with the duty and obligation of considering only the record as it appears before the Court at the time of the hearing". (Court of Civil Appeals opinion, Petitioner's appendix Page A-4, citing numerous cases). The trial court therefore was fully justified in sustaining Respondent's Motion for Summary Judgment.

The Judgment of the trial court was appealed by Petitioner to the Court of Civil Appeals sitting in Dallas. In Texas, the record on appeal consists only of the transcript when, as here, a statement of facts is not necessary. Rule 371, *Texas Rules of Civil Procedure*. The transcript upon which Petitioner predicates his appeal is completely devoid of pleading, motion or evidence raising an issue as to the limitations defense. Matters not contained in the transcript but shown only by the briefs or oral argument cannot be considered by the Appellate Court. *Barney vs. Credit Plan Corporation*, 403 SW2d 230 (Tex. Civ. App. — San Antonio 1964 no writ); *Schland vs. Schland*, 415 SW2d 28 (Tex. Civ. App. — Houston 1967,writ ref'd, n.r.e.); 4 *Tex. Jur.* 2d, Rev., Part 2, Pages 310 to 311 (1974). The Texas Court of Civil Appeals, although noting that Petitioner *states* that

certain things happened in Illinois and *says* that the case there was dismissed and attaches a xerox *copy* of the Illinois court *opinion* in his *brief,* clearly found that these matters were not a part of the record on appeal and that there was nothing in the record to indicate that these matters were ever presented to the trial court. The briefs to which Petitioner refers on Page 4 of his Petition are likewise not a part of the transcript, were not even attached to Petitioner's brief in the Court of Civil Appeals, and form no part of the record of this case at the present time.

Judicial notice is merely *a way of introducing evidence* without resorting to the ordinary formalities; it does not circumvent the requirements of orderly judicial procedure. *Mutual Life Insurance Company of New York vs. McGrew,* 118 US 291, 23 S.Ct. 375, 47 L. Ed. 480 (1903); *Ohio Bell Telephone Co. vs. Public Utilities Commission of Ohio,* 301 US 292, 57 S.Ct. 728 81 L. Ed. 1093 (1937); *Shapleigh vs. Mier,* 299 US 468, 57 S.Ct. 261, 81 L. Ed. 355 (1937). The theory of judicial notice is that the fact to be noticed is so notorious or its existence so easily ascertainable that proof will not be required. *Levlon vs. Dallas Ry. & Terminal Co.,* 117 S.W.2d 876 (Tex. Civ. App. — Dallas 1938, writ ref'd); 1 McCormick & Ray, *Texas Law of Evidence,* §151 at 170. The Illinois opinion which Petitioner attached to his brief in unauthenticated form is not relied upon by him to show what the *law* is in Illinois, but rather is a belated effort to prove certain basic *facts.* What may have occurred in another law suit in a foreign state is not so notorious or easily ascertainable that no proof would be required and Texas procedure properly requires that authenticated copies

of any pertinent records or proceedings must be formally introduced into evidence. *Adams vs. State Board of Insurance, supra.* At the very least, it would be incumbent upon Petitioner to *request* the trial court to recognize the Illinois case before being permitted to complain now of its failure to do so. In *Mutual Life Insurance Company of New York vs. McGrew, supra,* this honorable Court clearly acknowledged that judicial knowledge cannot be used to *later* supply proof of matters not contained in the record on appeal.

In exercising its appellate jurisdiction over cases appealed from State Courts, this Court has heretofore determined that it will not take judicial notice of matters that the Court from which the appeal is taken will not judicially notice. *Hanley vs. Donoghue,* 116 US 1, 6 S. Ct. 242, 29 L. Ed. 535 (1885); *Adam vs. Saenger,* 303 US 59, 58 S. Ct. 454, 82 L. Ed 649 (1938). This Court can only consider facts which were properly presented to the trial court and made a part of the record on appeal. *Hedgebeth vs. North Carolina,* 334 US 806, 68 S.C. 1185, 92 L. Ed. 1739 (1948); *Adrickes vs. Kress & Co.,* 398 US 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); 4A *C.J.S.* §702 *Appeal & Error* 530 (1957); 5 *C.J.S.* §1480(c) *Appeal & Error* 749-750 (1958).

CONCLUSION

Petitioner's brief is based in its entirety upon matters which were not in evidence before the trial court and not a part of the record on appeal. Viewed from the standpoint of the District Judge in the trial court with the uncontradicted evidence before him, it is clear that his judgment was a sound and correct one. Petitioner did not ask the Court to take judicial notice of a foreign proceeding, did not request permission to reopen the hearing to present evidence, and did not take any other action to present the foreign proceedings to the Court as orderly procedure require. Such is also the case with the Texas Court of Civil Appeals in their consideration of the record before it, properly disregarding unauthenticated claims made outside of the record and not in evidence before the trial court whose decision it was reviewing. No federal question has been presented. Not a single authority has been cited to support Petitioner's claims relating to the question of judicial notice. The Courts that heard and opined in *Burnett, supra,* certainly had before them no such *evidentiary* issues. The applicable Texas law is clear and undisputed as is its binding effect as the law of the case.

Finally, Petitioner appeals that his cause should not be "thwarted." The requirements of orderly judicial procedure worked no hardship upon Petitioner in this case. He complains now of the failure to grant a motion which was never made. Nothing that either Respondent or the Texas Courts did de-

prived him of any federal right. Respondent therefore prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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